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NO.

SUPREME COURT OF THE UNITED STATESERK

ALEXANDER L STEVAS,

\_\_\_\_

OCTOBER TERM, 1982

LOIS EVELYNE SHAFF,

Petitioner,

v.

UNITED STATES OF AMERICA, VERNE ORR, Secretary of the Air Force, and LUZ ZORAIDA VELANDIA SHAFF,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Counsel of Record for Petitioner LOIS EVELYNE SHAFF

#### QUESTIONS PRESENTED FOR REVIEW

This case presents questions of first impression under the Survivor Benefit Plan, 10 USC §§1447-1455 ("SBP"). Petitioner was the widow of a member of the Air Force who elected benefits for "wife and children" under SBP. The deceased member had named as his wife respondent Luz Zoraida Velandia Shaff ("Luz"), but his Dominican Republic "divorce" from petitioner was found to be invalid because of lack of domicile and lack of notice; thus the district court concluded petitioner was the surviving wife and eligible widow entitled to benefits. The of appeals agreed that petitioner was ti. member's lawful widow, but held that only the purported children of the member were entitled to SBP benefits. The children were not parties to the litigation nor had any claims been advanced on their behalf nor had the issues upon which the court of appeals based its decision been raised in

the district court or on appeal.

The questions presented to this Court are:

First, did the court of appeals err in denying SBP benefits to petitioner who was the legal eligible widow of a participating military retiree who had elected benefits for wife and children?

Second, did the court of appeals err in denying SBP benefits to petitioner based on issues never raised before the district court or on appeal and conferring such benefits on non-parties for whom no claim had been made?

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# SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1982

LOIS EVELYNE SHAFF,

Petitioner,

v.

UNITED STATES OF AMERICA, VERNE ORR, Secretary of the Air Force, and LUZ ZORAIDA VELANDIA SHAFF,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOIS EVELYNE SHAFF petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

# 1. OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Appendix A) is reported at 695 F. 2d 1138 (9th Cir. 1983). The opinion of the United States District

Court for the Northern District of California (Appendix C) is not reported.

#### 2. JURISDICTION

- A. The judgment of the Court of Appeals for the Ninth Circuit was filed and entered January 4, 1983.
- B. The Order of the Court of Appeals denying a petition for rehearing was filed February 28, 1983.
- C. Jurisdiction of this Court is based on 28 USC  $\$1254(1).\frac{1}{}$

# 3. STATUTES INVOLVED

This case involves the interpretation of the Survivor Benefit Plan (hereinafter "SBP"), 10 USC \$\$1447-1455, first enacted September 21, 1972 (Pub. L. 92-425, \$1(3), 86 Stat. 706 et seq.). The provisions of SBP in effect during the pendency of this

<sup>1/</sup> This petition is timely since the ninetieth day following denial of the petition for rehearing was May 29, 1983, a Sunday, followed by Memorial Day, May 30, 1983, a holiday. 28 USC \$2101(c), Supreme Court Rules 20.4, 29.2.

litigation are set forth in Appendix E.

The SBP has since been amended by the
Uniformed Services Former Spouses'

Protection Act enacted in October, 1982,
effective February 1, 1983 (Pub. L.

97-252, Title X, 96 Stat. 730 et seq.).
the new legislation, to the extent that
it will be discussed herein, is included
in Appendix F.

# 4. STATEMENT OF THE CASE

A. BASIS OF JURISDICTION IN THE DISTRICT COURT

Petitioner Lois Evelyne Shaff

(plaintiff and appellee below) brought

this action against the United States

and the Secretary of the Air Force to

declare her rights as the surviving

widow of Donald E. Shaff, a deceased

retired officer of the United States

Air Force, to obtain money due her under

the Survivor Benefit Plan, 10 USC

§§1447-1455 (hereafter "SBP"), and for an injunction prohibiting the Air Force from paying money or according any other benefits as surviving widow of Donald Shaff to any other person. 2/ Jurisdiction over the United States in the district court was based on 28 USC \$1346(a)(2)(suit to recover money against the United States not exceeding \$10,000). Jurisdiction over the Secretary of the Air Force was based on 28 USC \$1331 (suit arising under the laws of the United States where the amount in controversy was in excess of \$10,000), 28 USC \$1361 (suit to compel officers of the United States to perform duties owed to plaintiff), 28 USC \$2201 (suit for declaratory relief), and 5 USC

<sup>2/</sup> The Administrator of Veterans Affairs was originally a party defendant against whom relief was sought. In response to a motion to dismiss the Administrator, plaintiff agreed that the case against the Administrator (cont'd on page 5)

\$\$701-706 (suit to review and compel agency action). Respondent Luz Zoraida Velandia Shaff (hereafter sometimes referred to as "Luz") was permitted to intervene below pursuant to Rule 24, Federal Rules of Civil Procedure and asserted jurisdiction under the same statutes in her complaint in intervention. Luz, a Colombian, claimed to have married Shaff in Colombia after he had obtained a "divorce" from petitioner in the Dominican Republic, thus claimed to be the eligible widow under SBP.

# B. SUMMARY OF PROCEEDINGS BELOW

It was agreed by all parties in the district court that there was no genuine dispute as to the material facts in the case, thus the parties submitted the case on cross-motions for summary judgment

\_2/ was premature and could be dismissed without prejudice, and it was dismissed in the District Court's final judgment. (Appendix D).

based on official Air Force records and the declaration of petitioner. The government (respondents United States and Secretary of the Air Force) 'took no position as to which woman was entitiled to benefits, but rather asserted it was acting as "stakeholder". 3/ The district court concluded that the "divorce" obtained by Donald Shaff was obtained without due process of law and was invalid as against public policy, since the "divorce" was obtained in the absence of domicile in the Dominican Republic and because the notice given was so insufficient as to amount to a denial of due process. Thus, the court concluded

<sup>3/</sup> Petitioner had also claimed entitlement to benefits erroneously paid to Luz. The government contested that claim and the district court held that it had acted in good faith in making such payments, thus denied those benefits to petitioner. No appeal was taken from that decision by petitioner and the issue is not before this court.

that petitioner was the legal widow of Donald Shaff and, as such, was entitled to benefits under SBP. 10 USC \$1448(b), 1450(a). (Appendix C). Summary judgment was entered in favor of petitioner and against Luz. (Appendix D). Luz appealed. The government did not.

On appeal, the Court of Appeals for the Ninth Circuit agreed that petitioner was the legal widow of Donald Shaff and affirmed the judgment against Luz. Nevertheless, the court reversed the judgment in favor of petitioner, finding that despite her status as legal widow of Donald Shaff, Shaff's election to participate in SBP was not intended to benefit petitioner. The court found that Shaff had the mistaken belief that Luz was his wife, thus his election to provide an annuity for his spouse was invalid since Luz was not entitled to benefits and therefore only that portion of the election to provide

benefits for children remained valid.

The purported children of Donald Shaff were not parties in the district court, nor was any action brought on their behalf. Moreover, the issue upon which the Court based its decision was never raised in the district court or on appeal by any party, thus petitioner never had any opportunity to brief the issue or to contest the legitimacy of any claim by any party other than Luz. Those issues were presented to the Court of Appeals in a petition for rehearing and for rehearing en branc but said petition was denied.

The present petition for <u>certiorari</u> seeks review of the decision of the Court of Appeals on the ground that its decision of an important question of federal law, interpretation of the SBP, was one of first impression, was wrong,

and should be resolved by this Court and that its decision resolving issues never litigated in favor of persons not parties to the litigation is in conflict with desicions of other Courts of Appeals and this Court and departs from the accepted and usual course of judicial proceedings. An examination of the undisputed facts, as established by the official records and petitioner's declaration is a predicate for presentation of petitioner's arguments and a concise statement of relevant facts follows.

# C. STATEMENT OF RELEVANT FACTS

Petitoner Lois Evelyne Shaff and

Donald E. Shaff then a lieutenant in the

United States Air Force were married

on June 17, 1947 in Kentucky. In 1953,

Donald was assigned to Hamilton Air

Force Base and he and Lois moved to California where they remained together until November, 1967, except for the period of 1959-1962 when Donald was assigned to duty in Colombia. During these years the Shaffs lived together  $\frac{4}{}$ and in November, 1962 leased an apartment at 7555 Geary Boulevard, San Francisco, where they lived together continuously until November, 1967 and where Lois continuously lived thereafter to date. On March 31, 1964, Donald retired from the Air Force as a major in San Francisco and thereafter drew retirement pay, though he did not obtain employment and plaintiff continued to work as a legalsecretary (as she still does) to support

<sup>4</sup>/ During the period 1959-1962, Lois spent time with her husband in Colombia and at their residence in California where she was employed as a legal secretary.

herself and her husband. On November 2, 1964, Donald Shaff left San Francisco, allegedly to visit his ailing mother in Rochester, New York. Lois never saw him again. From that time on, Lois diligently searched for her husband, but, though she was able to communicate with him by correspondence routed through his mother in Rochester, New York, she never discovered where he was until September, 1978 when she heard from Donald's brother that Donald had died. The last time Lois had heard from Donald was in 1974, when she received a letter postmarked February 26, 1974, Wichita, Kansas, which was . addressed to her at her apartment at 7555 Geary Boulevard, San Francisco, and which contained the following cryptic message:

"This is to inform you that we

were divirced [sic] last year and you should file your income tax as a single person. No one in Rochester knows more than that.

Goodbye and Good Luck
/s/ D E Shaff."

Lois had no idea what Donald meant by his note since she never received any prior notice or information about any divorce proceedings, did not know where he was, and did not know how to find him. Indeed Lois was at all times required to and did file a joint tax return, never obtained a divorce herself or commenced any dissolution proceedings, though Donald refused to make his whereabouts known, and at all times considered herself Donald's wife, though, as indicated, after the letter of February, 1974, Lois never heard from Donald again. After Lois heard Donald had died, her lawyer, who had been trying to locate Donald, tried to assert benefit claims to the Air Force on behalf of Lois, and it was then that an Air Force representative told Lois that Donald had obtained a "divorce" and had "remarried".

The Air Force records showed that Donald Shaff traveled to Colombia in November, 1967 and except for brief periods remained there until February, 1978. On March 2, 1973 he obtained a "divorce" from plaintiff in the Dominican Republic, alleging that he was a domiciliary of Colombia, giving "notice" of the divorce by publishing said notice in a newspaper, presumably Dominican, called "Ultima Hora". According to the records, Donald was physically present in Colombia at all times during the pendency of the "divorce proceedings". On April 5, 1973, Donald "married" Luz Velandia, respondent herein, in Colombia. Thereafter, on May 8, 1973,

Donald elected to participate in the Air Force SBP selecting an annuity for spouse and children, identifying Luz Velandia as his spouse. Donald died in the Batavia, New York Veterans Hospital on March 28, 1978 and Luz applied for and recieved survivor benefits as well as arrearages of retired pay in the sums of \$1,118.19 and \$829.96, respectively. Lois then applied for survivor benefits in October, 1978, whereupon payments to Luz were stopped and ultimately an opinion from the Comptroller General was sought as to the appropriate recipient of benefits. The Comptroller General determined that while the divorce obtained by Donald Shaff was of doubtful validity, sufficient uncertainty existed as to the marital status of the claimants so that neither claim could be allowed subject to a determination of

status by a court of competent jurisdiction and the parties were so notified.

Lois had never been in the Dominican Republic, never read or heard of "Ultima Hora", and never received any information or notice of the divorce proceedings.

After the Comptroller General's

"decision," this action followed and as
indicated, was resolved on cross-motions
for summary judgment.

# D. THE DECISIONS BELOW

The district court found and the Court of Appeals agreed that pursuant to 10 USC  $$1450(a), \frac{5}{}$  SBP benefits could

<sup>5/</sup> The complete statutory scheme of SBP is included in Appendix E. 10 USC \$1450(a) provides, in pertinent part:

<sup>(</sup>a) Effective as of the first day after the death of a [participating retiree] . . . a monthly annuity . . . shall be paid to --

<sup>(1)</sup> the eligible widow or

widower:

<sup>(2)</sup> the surviving dependent children in equal (cont'd on page 16)

not be paid to an "outside beneficiary" if there was an eligible widow or surviving dependent children of a participating retiree. A widow is the "surviving wife" of such retiree as defined in 10 USC \$1447(3). The courts below agreed that the definition of "wife" must be found in the law of the State of California, since the term is not defined in the SBP and since domestic relations are a matter of state law under Hisquierdo v. Hisquierdo, 439 US 572, 581 (1979) and In re Burrus, 136 US 586, 593-4 (1890).

<sup>(</sup>cont'd from page 15) shares, if the eligible widow or widower is dead, dies, or otherwise becomes ineligeble under this section;

<sup>(3)</sup> the dependent children in equal shares if the [participating serviceperson] . . . elected to provide an annuity for dependent children bug not for the spouse; or

<sup>(4)</sup> the natural person designated . . . if there is no eligible beneficiary under clause (1) or (2).\*

The courts found that the Dominican Republic "divorce" obtained by Donald was invalid since the Domincan Republic had no legitimate interest in the marital status of the parties, neither of whom were domiciliaries, residents, or had any other contacts with the Dominican Republic. Crouch v. Crouch, 28 Cd. 2d 243, 249(1946); see also Williams v. North Carolina, 325 US 226, 230(1945). Moreover, the "divorce" was invalid for another reason. Lois was denied notice, though Donald could have given her notice had he desired to do so. The publication of notice in a Dominican newspaper, to which, the district court observed "needless to say, Lois had no subscription", was so defective as to offend public policy, independently invalidating the divorce. Mullane v. Central Hanover Trust Co., 339 US 306, 314(1950); In

re La Opinion, 10 Cal. App. 3d 1012, 1019, n.3(1970).

Accordingly since the divorce was invalid, the courts agreed that the marriage between Donald and Luz offended public policy as a bigamous marriage under Cal. Civ. Code \$4401.6/

The district court then concluded that since Lois was the eligible widow of Donald Shaff, she was entitled to benefits under SBP. The Court of Appeals, on the other hand, agreed that Luz could

 $<sup>\</sup>underline{6}/$  Cal. Civ. Code \$4401 provides in pertinent part:

<sup>&</sup>quot;A subsequent marriage contracted by any person during the life of a former----wife of such person, with any person other than such former----wife, is illegal and void from the beginning, unless:

<sup>(1)</sup> The former marriage has been dissolved or declared a nullity prior to the date of the subsequent marriage.

The invalidity of such a marriage may be shown at any time. Parmann v. Parmann, 56 Cal. App. 2d 67, 69(1942).

not receive benefits, but then held that Shaff's purported children should get the benefits, not Lois. The court of appeals recognized that Luz had no standing to attack the judgment in favor of Lois against the government, but claimed it had jurisdiction to review that part of the judgment.

#### 5. REASONS FOR GRANTING THE WRIT

The proper disposition of military retirement pay and military spousal benefits have been a recent concern of this Court and Congress, as evidenced by the decision of this Court in McCarty v. McCarty, 453 US 210(1981) and Congress' response thereto, i.e. the enactment of the Uniformed Services Former Spouses' Protection Act, Pub. L. 97-252, Title X, 96 Stat. 730 et seq. (Appendix F). In this case, the court of appeals decided an important question of federal law

which has not been, but should be, settled by this Court, i.e. the rights of the widow of a retiree under SBP. It will be shown that the decision of the Court of Appeals was wrong and to allow the decision to remain standing will create great mischief in the administration of SBP and will deny the petitioner herein the benefits to which she should be entitled. Moreover, by deciding issues not raised before it or before the district court, and rendering a judgment in favor of non-parties, the court of Appeals departed from generally accepted rules of law and its decision is in conflict with decisions of this Court and other Courts of Appeals.

A. THE COURT OF APPEALS' DECISION
DENYING PETITIONER BENEFITS UNDER SBP WAS
CONTRARY TO LAW

There can be no question that for the

reasons stated by the district court and the Court of Appeals, the Dominican "divorce" obtained by Donald Shaff was invalid and petitioner Lois Evelyne Shaff was Donald's surviving wife and therefore his widow. See Section 4. D., supra. As his widow, Lois would be entitled to benefits under SBP if her spouse elected to participate (or did not elect to opt out of participation). See 10 USC \$1448(a)(2)(A) and compare with Pub. L. 92-425, §3(b), 86 Stat. 706, 711-712. In the present case, Donald elected benefits for his spouse and dependent children but named Luz as his spouse. The attempt to confer benefits upon Luz failed because under 10 USC \$\$1448(b), 1450(a)(4), no benefits could be conferred upon another if an eligible widow or dependent children existed. Under the recent amendments to SBP, Congress retained the same restriction on married members. Pub. L.

97-252, Title X, \$1003(b),(c), amending 10 USC \$\$1448(b), 1450(a)(4). Contrary to the Court of Appeals' conclusion that election by Donald Shaff to provide benefits to "wife and children" was in the "mistaken belief that Luz was his spouse" (Appendix A, p. 90), there can be no doubt that Donald never intended to legitimately divorce Lois. As the district court found, Donald knew where Lois was (he wrote to her in 1974), thus his failure to advise her of his intentions in 1973 makes it clear that he "never intended to give Lois an opportunity to voice her objections to the divorce until it was a fait accompli". District Court opinion, Appendix C, p. 15. The reasons for that are obvious.

Prior to this Court's decision in McCarty v. McCarty, supra, in 1981, the established law in California, as in

other community property jurisdictions, was that military retirement pay was community property. In re Marriage of Fithian, 10 Cal. 3d 592(1974). By circumventing the notice requirements of due process and by hiding from Lois, Donald deprived her of any right she may have had to establish a right to a share of Donald's retirement pay. Under SBP, the retirement pay of a participating member is reduced by a certain percentage as his contribution to the Plan. 10 USC \$1452. Such contributions were thus the contributions not only of Donald Shaff, but were under California law, those of petitioner Lois Evelyne Shaff as well. In re Marriage of Fithian, supra. The Congressional response to McCarty reinforces the view that at all times the financial contribution to establish the SBP benefit by Donald Shaff was derived from community funds. (McCarty was not

"retroactive." Wilson v. Wilson, 667 F. 2d 497, 498-9 (5th Cir. 1982)). Under Pub. L. 97-252, Title X, \$1002(a), 96 Stat. 731, adding 10 USC \$1408(c)(1)(appendix F, p.1), Congress has provided that local law prevails in determining the nature of retired pay. Under SBP, elections may provide ex-spouses with benefits in connection with judicial decrees even if there is a spouse and/or dependent children. Id., \$1003, 96 Stat. 736, 737 (Appendix F, pp.2-9). Thus, while it is true that participation in SBP is voluntary, as pointed out in McCarty, supra, 227, there can be no doubt that the spouse has a stake in the matter, and such stake has been recognized by Congress. For example SBP requires that if a married retiree elects not to participate in the Plan at the maximum level, or elects to provide an annuity for dependent children but not the spouse,

the spouse shall be notified of such election. 10 USC \$1448(a)(3). Congress further mandated that regulations be promulgated providing information of available elections to the member and his spouse. 10 USC \$1455. While it is true that the SBP only requires notice and does not compel participation, McCarty, supra, 227, n.20, the only logical reason for requiring such notice must have been to permit a spouse threatened with deprivation of benefits to protect herself from the implications of such decision. Barber By and Through Barber v. United States, 676 F 2d. 651 (Ct. Cl. 1982). In Barber, the Court of Claims recognized that a spouse would be "directly and adverseley affected" by an election to deprive her of benefits and the failure to give notice thereof rendered invalid an election to opt out of SBP. 676 F. 2d at 658. Before Donald Shaff could preclude his lawful wife from obtaining benefits under SBP, he had an obligation to see

that she was notified of his action. The significance of all this is to demonstrate the importance given by Congress to providing for the welfare of surviving spouses of members of the Armed Services. The McCarty court recognized this when it commented at 453 US 228:

"The SBP, which was referred to as the 'widow's equity bill,' - - was enacted because of Congress' concern over the number of widows left without support through low participation in the RSFPP - - -."

Furthermore, elections under SPB are generally irrevocable. See McCarty, supra, 227, n. 20; 10 USC \$\$1448(a)(4),(5), 1450(g). Thus, if a member elected to cover his spouse under SBP such election could not be revoked, regardless of his later intent or changed circumstances. In the present case, Donald Shaff elected spousal coverage. Regardless of his intent to cover a stranger, he could not revoke his election and

the court should not and cannot do it for him.

The Court of Claims has held that despite a member's intent, the determinative issue is whether a valid irrevocable election to provide benefits under SBP has been made. MacConnell v. United States, 217 Ct. Cl. 33(1978). In MacConnell, the member, unmarried at the time, stated he might marry again and "elected" to provide spousal benefits udner SBP if he did remarry. Shortly before his death, the member remarried but never filed a subsequent election. Court did not doubt his intent, but held that when he purported to provide benefits he could not and when he could he did not. Thus, benefits were denied due to a lack of valid election. 217 C. Cl. at 38.

In the present case, the member not only could, but did, elect benefits for his spouse. He had a legal wife and when he died he left a legal widow, petitioner Lois

Evelyne Shaff. He elected benefits for spouse and children, thus 10 USC \$1450(a)(3) (election for children but not for spouse) was inapplicable and the only way any surviving children could receive benefits would be on the death or ineligibility under Section 1450 of the widow, Lois. 10 USC \$1450(a)(2). Lois has not become ineligible under Section 1450, is the widow of Donald Shaff, and therefore is the only person presently entitled to benefits under SBP. 7/

It is not unusual either in State or federal practice in the area of probate and family law to rach results based on actual legal relationships rather than intent. Estate of Long, 198 Cal. App. 2d 732, 738(1961) (attempt to deprive legal widow of property by "putative" spouse);

MacConnell v. United States, supra.

The district court recognized that at some point the surviving children of Donald Shaff could obtain benefits under 10 USC \$1450(a)(2). Appendix C, p.20.

In this case, the decision of the Court of Appeals connot be justified in law or fact. To carry the decision to its logical extreme, if Shaff elected benefits for wife only, intending Luz to obtain spousal benefits, under the court's decision, if Shaff's intent prevailed, since Luz was ineligible because Lois was Shaff's widow, no one would get any benefits. Such a result would totally frustrate the statutory scheme, as does the present decision.

In sum, Lois was the widow of Donald Shaff. Shaff elected SBP coverage for wife and children. It is conceded that he intended Luz to receive the benefits, but she could not because she was not his wife. Lois was. Under SBP, Shaff's election was irrevocable. Lois is entitled to the benefits due to her as a result of her status.

B. THE COURT OF APPEALS IMPROPERLY
CONSIDERED ISSUES NOT RAISED BY ANY
PARTY AND RENDERED JUDGMENT IN FAVOR OF
NON-PARTIES

The only claims made by plaintiff in intervention were that she was the widow of Donald Shaff therefore entitled to SBP benefits under 10 USC \$1450(a)(1) or that she was entitled to benefits regardless of status under 10 USC \$1450(a)(4). On appeal she also claimed rights as a "putative spouse", though that issue was never raised in the district court. At no time did she or any other party claim that Donald Shaff's intent controlled and that though Luz was not entitled to SBP benefits, neither was Lois. The alleged children of Donald Shaff were never parties below.

The Court of Appeals recognized that the only appeal taken in the present

case was by Luz, not by the government. Appendix A, p. 5, n.1, pp. 11-12. The court then stated that nevertheless it was entitled to review the judgment in favor of Lois because to do otherwise would "permit an unjust result". It placed its authority for such review on cases such as Moitie v. Federated Department Stores, Inc., 611 F. 2d 1267  $(9 \text{ Cir. } 1980)^{8}$ , Kicklighter v. Nails by Jannee, Inc., 616 F. 2d 734 (5 Cir. 1980), Bryant v. Technical Research Co., 654 F. 2d 1337 (9 Cir. 1981), and Estate of McDill, 14 C. 3d 831 (1975). But the Court overlooked the fact that unlike Kicklighter, Bryant, and McDill which permitted appeals to resolve issues affecting rights of non-appealing parties, the parties who are affected by the present

<sup>8/</sup> Which the court claimed was reversed on other grounds, 452 U.S. 394 (1981).

decision were never before the Court,
i.e. the purported "children" of Donald
Shaff. Moreover, in Moitie, this Court
did not reverse "on other grounds",
but, rather, reversed the decision of
the Court of Appeals for the Ninth
Circuit, on point. With respect to the
contention that "justice" required review,
the Supreme Court in Moitie observed that:

"The Court of Appeals also rested its opinion in part on what it viewed as 'simple justice'. But we do not see the grave injustice which would be done by the application of accepted principles of res judicata. 'Simply justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata'. Heiser v. Woodruff, 327 U.S. 726, 733 (1946). The Court of Appeals' reliance on 'public policy' is similarly misplaced. This Court has long recognized that '[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties'. Baldwin v. Traveling Men's Assn., 283 U.S. 522, 525 (1931)."

Federated Department Stores, Inc. v.

Moitie, 452 U.S. 394, 401(1981).

The observations of Justice Blackmun, joined by Justice Marshall, concurring in the Supreme Court's decision in Moitie, distinguishing Estate of McDill, (a case relied on by the Court of Appeals in this case) is also instructive.

Justice Blackmun pointed out that the Court of Appeals' reliance on McDill was misplaced in that, unlike McDill,

Moitie was not a case where the appealing and nonappealing parties made competing claims to a single property.

As noted in the present case, there were no parties competing with Lois

except Luz. Since the "children" were never parties, they had no standing to appeal and could not be the beneficiaries of any other appeal. In <a href="mailto:Bryant v.">Bryant v.</a>
<a href="mailto:Technical Research Co.">Technical Research Co.</a>, <a href="supra">supra</a>, <a href="mailto:1343">1343</a>, the Court of Appeals for the Ninth Circuit held:

"To have standing to appeal a party must be 'aggrieved by the District Court order.' --- A party may only appeal to protect 'its own interests', not those of any other party."

Thus, not even the government had any standing to appeal and its presence as a "party" (actually a self-professed stakeholder), created no right of review of a decision allegedly affecting non-parties. Anthony v. Petroleum Helicopter, Inc., 693 F 2d 495, 497 (5 Cir. 1982); and compare Boston Tow Boat Co. v. United States, 321 U.S. 632 (1944). To have standing to appeal, a person must be a party at the time a judgment is entered

and must be aggrieved by the decision from which appeal is taken. Hoover v. Switlik

Parachute Co., 663 F. 2d 964, 966 (9th Cir. 1981); Union of Prof. Airmen v. Alaska

Aeronautical, 625 F. 2d 881, 884 (9th Cir. 1980).

Moreover, since no right to children's benefits was ever asserted in the district court, Lois was never called upon to dispute either their status or their rights. 9/ While the administrative record lends some support to the existence of the children, their status simply never was an issue. If the issue could have been raised by Luz, the failure to do so resulted in its being abandoned. Earman Oil Co.,

Inc. v. Burroughs Corp., 625 F. 2d 1291,
1294, n. 10 (5th Cir. 1980).

Moreover, the manner in which the

Court of Appeals decided the case precluded

<sup>9</sup>/ Indeed one purported child is over 18 and may not be entitled to benefits at all. 10 USC \$1447(5)(B).

petitioner herein from presenting any of the legal or factual arguments raised in Part 5A of this Petition. Lois was called upon to litigate only the issues referred to hereinabove, i.e. whether she or Luz was the widow of Donald Shaff or whether Luz could obtain benefits under SBP pursuant to USC \$1450(a)(4), even if Lois was Donald's widow.

Even if Luz had standing to raise issues pertaining to her alleged children's rights, she did not. The Court of Appeals should therefore not have decided the matter.

In <u>Singleton</u> v. <u>Wulff</u>, 428 US 106, 120-121 (1976), this Court stated:

"It is the general rule, of course, that a federal appellate court does not consider an issue not passes upon below. In Hormel v. Helvering, 312 US 552, 556,--- (1941), the Court explained that this is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues ... [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to

introduce evidence. We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming that there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute. We think he was justified in not presenting those arguments to the Court of Appeals .--- The issue resolved by the Court of Appeals has never been passed upon in any decision of this Court. This being so, injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to he heard."

In exceptional cases, of course, this

Court has indicated that a case might be
appropriately remanded to the district court
for a determination of issues not previously
raised below. Youakim v. Miller, 425 US 231
(1976); see also Connoly v. Pension Benefit
Guar. Corp., 581 F. 2d 729, 734-735 (9th
Cir. 1978), cert. den. 440 US 935 (1979).

While petitioner believes that the decision of the Court of Appeals should be reversed, as contrary to law, at the very

least, petitioner should have an opportunity to litigate the legal and factual questions raised by the court's decision, and in this petition, in the district court, i.e. status of the "children" of Donald, petitioner's entitlement to notice, petitioner's claims based on community property rights, and petitioner's entitlement to benefits regardless of Donald Shaff's intent.

The Court of Appeals stated that it reviewed the case despite the absence of appealing parties to avoid an "unjust result." But, is it just that the legal widow of a military officer, abandoned without remorse after 20 years of marriage, purportedly "divorced" without notice six years later, deprived of her share of her husband's retirement pay, be denied benefits, paid for in part with community funds, after a contested adversary proceeding as a result of a decision based on the resolution of

issues with which petitioner was never confronted and never had an opportunity to contest?

The apparent sympathy of the Court of Appeals for the purported "children" of Donald Shaff resulted in a departure from the usual standards governing litigation. A "just result," like "simple justice," would have been better achieved if the court below had refrained from deciding this case based on its own "ad hoc determination of the equities," compare Moitie, supra 452 US at 401, and had limited its decision to the issues and parties before it.

# 6. CONCLUSION

The petition for writ of certiorari should be granted.

Dated: May 31, 1983

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